No. 06-1486

FILED
JUN 11 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

RICHARD HAGER,
Petitioner,

v.

MAY DEPARTMENT STORES COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal of California, Second Appellate District

BRIEF IN OPPOSITION

David E. Martin
Catherine E. Sison
MACY'S, INC. (f/k/a Federated Department Stores, Inc.)
Law Department
611 Olive Street, Suite 1750
St. Louis, MO 63101
(314) 342-6719
(314) 342-3066 FAX
Counsel for Respondent

John S. Curtis
Counsel of Record
LAW OFFICES OF
OF JULIA AZRAEL
5200 Lankershim Blvd.
Suite 850
North Hollywood, CA 91601
(818) 766-5177
(818) 766-5047 FAX
Counsel for Respondent

June 11, 2007

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

CORPORATE DISCLOSURE STATEMENT

On August 30, 2005, after the filing of this action, Federated Department Stores, Inc. acquired Respondent The May Department Stores Company. On June 1, 2007, Federated Department Stores, Inc. changed its name to Macy's, Inc. Macy's, Inc. is a publicly traded corporation.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

A. Earlier Area Sales Manager Class Actions 1

1. Gorman v. Robinsons-May, Inc. 1

2. Duran v. Robinsons-May, Inc. 2

B. Proceedings Below 4

REASONS FOR DENYING THE PETITION 6

A. A Plaintiff Has Neither a Property Nor a Due Process Right to File a Class Action 7

B. A Plaintiff May Be Collaterally Estopped From Re-Litigating a Previously Decided Class Certification Decision, Even in the Absence of Notice of That Decision 10

C. A Plaintiff May Be Collaterally Estopped From Re-Litigating A Class Certification Decision if the Plaintiff Is in Privity With the Plaintiff Who Litigated that Decision and if His Interests Were Adequately Protected 12

D. Petitioner Fails to Set Forth a Compelling Reason for This Court to Grant His Petition 16

CONCLUSION 16

TABLE OF AUTHORITIES

Cases

Californians for Disability Rights v. Mervyn's LLC,
39 Cal. 4th 223 (2006) 9

Cartt v. Superior Court,
50 Cal. App. 3rd 960 (1975) 7

City of San Jose v. Superior Court,
12 Cal. 3rd 447 (1974) 8

Cohen v. Beneficial Loan Corp.,
337 U.S. 541 (1948) 9

Daar v. Yellow Cab Co.,
67 Cal. 2nd 695 (1967) 3, 8

Discover Bank v. Superior Court,
36 Cal. 4th 148 (2005) 9, 10

Enterprise Rent-A-Car,
235 Cal. App. 3rd 806 (1991) 3, 4

Feitelberg v. Credit Suisse First Boston, LLC,
134 Cal. App. 4th 997 (2005) 8

Headwaters, Inc. v. U. S. Forest Service,
399 F.3rd 1047 (9th Cir. 2005) 14

Hogan v. Ingold,
38 Cal. 2nd 802 (1952) 9

Home Savings & Loan Assn. v. Superior Court,
42 Cal. App. 3rd 1006 (1974) 12

In re Bridgestone/ Firestone, Inc., Tires Products Litigation,
333 F.3d 763 (7th Cir. 2003) 6, 7, 11, 16

Johnson v. American Airlines, Inc.,
157 Cal. App. 3rd 427 (1984) 12

Newport Beach Country Club v. Founding Members of Newport Beach Country Club,
140 Cal. App. 4th 1120 (2006) 15

Richards v. Jefferson County,
517 U.S. 793 (1996) 13

Takeda v. Northwestern Nat. Life Ins. Co.,
765 F.2d 815 (9th Cir. 1985) 14

Victa v. Merle Norman Cosmetics, Inc.,
19 Cal. App. 4th 454 (1993) 14

Statutes and Rules

28 U.S.C. § 2072(b) 8

Cal. Bus. & Prof. Code § 17200, *et seq.* 1

Cal. Code of Civ. P. § 382 8

Cal. Lab. Code § 1194, *et seq.* 1

Cal. Lab. Code § 2698, *et seq.* 1

Fed. R. Civ. P. 23 8

STATEMENT OF THE CASE

After multiple California courts entered final judgments denying class certification to a putative class of employees for the purpose of recovering overtime pay, Petitioner filed this action seeking to certify the same class for the purpose of recovering the same overtime pay. As in the earlier cases, Petitioner, a former area sales manager at one of Respondent's department stores, contends that Respondent improperly classified him as an exempt employee to avoid paying overtime wages and asserted causes of action under California's Wage and Hour Laws (Cal. Lab. Code § 1194, *et seq.*), California's Unfair Competition Law (Cal. Bus. & Prof. Code § 17200, *et seq.*), California's Labor Code Private Attorney General Act (Cal. Lab. Code § 2698, *et seq.*), and for conversion. Despite final and conclusive judgments denying certification in the earlier cases, Petitioner contends he has a constitutional right to re-litigate the same class certification issue.

A. Earlier Area Sales Manager Class Actions

1. *Gorman v. Robinsons-May, Inc.*

In July 1997, Mark Gorman, a former area sales manager, filed a class action against Respondent in Los Angeles Superior Court ("*Gorman*") contending that Respondent improperly classified him as an exempt employee to avoid paying overtime wages and asserting causes of action under California's Wage and Hour Law and Unfair Competition Law as well as for fraud and negligent misrepresentation. (Plaintiffs' Appendix in the California Court of Appeal ("Plntffs. App."), at 103-125.) In December 1998, after extensive discovery and three certification hearings, the trial court refused to certify the proposed class and held that both

Gorman and his substitute class representative had failed to demonstrate the existence of a well-defined community of interest, including the predominance of common issues of law and fact. (Plntffs. App., at 128-139.) In addition, the trial court held that the class representatives were inadequate as they were former employees who had experienced problems performing their management duties. (*Id.*)

2. *Duran v. Robinsons-May, Inc.*

In September 1999, after the decision in *Gorman* was reduced to a final judgment, Janice Duran and Julia Ramos, present and former area sales managers represented by the same counsel as in *Gorman*, filed another class action against Respondent in San Bernardino Superior Court ("*Duran*"). (Respondent's Appendix in the California Court of Appeal ("Resp. App."), at 594-608.) As in *Gorman*, Duran and Ramos contended that Respondent improperly classified them as exempt employees to avoid paying overtime wages and asserted causes of action, dating from September 1995 to the present, under California's Wage and Hour Laws and Unfair Competition Law as well as for conversion.

In February 2002, the trial court, after reviewing a voluminous record consisting of hundreds of deposition transcripts, declarations, and exhibits, held that Duran and Ramos could not, among other things, establish the requisite community of interest to justify certification of their proposed class for their wage and hour and conversion causes of action because they could not demonstrate "that there are common questions of fact as to class members which predominate over questions of fact which affect individual class members." (Plntffs. App., at 149-154). In April 2003, the California Court of Appeal, Fourth Appellate District, affirmed, holding that "[c]ommon questions of fact could not predominate" and

declining to consider alternate grounds for the trial court's decision (i.e., typicality or adequacy of representation).[1] (Plntffs. App., at 156-165.) In August 2003, the Court of Appeal issued its remittitur to the trial court. (Plntffs. App., at 463.)

In January 2005, following the enactment by the California voters of Proposition 64, which precluded Duran and Ramos from proceeding as private attorneys general under their Unfair Competition Law cause of action without first satisfying the class action requirements, Duran and Ramos sought leave to amend their complaint to assert class allegations for that cause of action. The trial court refused to grant Duran and Ramos' request and reasoned as follows:

> . . . [T]he issue of class certification of the purportedly nonexempt area sales managers working for Robinsons-May has already been determined against plaintiffs in this case. Styling the same alleged Labor Code violations as unfair competition does nothing to change the fact that the Court of Appeal has already affirmed the trial court's denial of class certification for the same allegedly unlawful underlying conduct . . .. It is the existence of a final decision on these same class certification issues against plaintiffs which bars re-litigation and makes the proposed amendment improper. California does not, as a matter of precedent or policy, allow re-

---

[1] In California, the denial of class certification is an appealable order which, if it is not appealed or if it is sustained on appeal, becomes a final and binding determination of that issue. *Daar v. Yellow Cab Co.*, 67 Cal. 2nd 695, 698-699 (1967); *Enterprise Rent-A-Car*, 235 Cal. App. 3rd 806, 811 (1991).

> litigation of whether to certify a class once a death-knell order denying certification has become final. *Stephen v. Enterprise Rent-A-Car*, 235 Cal. App. 3rd 806, 817 [1991].

(Resp. App., at 642-644.)

B. Proceedings Below

In September 2003, immediately following the issuance of the remittitur in *Duran*, 64 individual area sales managers, represented by the same counsel as in *Gorman* and *Duran*, filed the present action in Los Angeles Superior Court ("*Alvarez*"). Petitioners' counsel again alleged that Respondent improperly classified plaintiffs as exempt employees to avoid paying overtime wages and asserted causes of action, dating from at least September 1995 to the present, under California's Wage and Hour Law, Unfair Competition Law, and the Labor Code Private Attorney General Act and for conversion.

In January 2005, immediately before the *Duran* trial court denied Duran and Ramos' motion for leave to amend their complaint, Petitioner's counsel asked the *Alvarez* trial court for leave to amend their complaint to assert class allegations in this case. As Petitioner's counsel explained to the trial court, the proposed class in *Duran* "by definition included the *Alvarez* plaintiffs" and the *Alvarez* plaintiffs had not previously asserted class allegations "because there was an [Unfair Competition Law] cause of action going forward in the . . . [*Duran* case] . . . and had that gone forward to completion, it would have generated a restitutionary award that would have also inured to the benefit of all the plaintiffs [in *Alvarez*]." (Resp. App., at 619-620). In June 2005, after the trial court granted the *Alvarez* plaintiffs' motion for leave

to amend, it granted Respondent's motion to dismiss the class allegations, holding that the *Alvarez* plaintiffs were *collaterally estopped* from re-litigating the class certification issue conclusively decided in *Duran*.[2]

The *Alvarez* plaintiffs thereafter appealed the trial court's decision to the California Court of Appeal, Second Appellate District. The Court of Appeal affirmed the trial court's decision and held that the *Alvarez* plaintiffs were *collaterally estopped* from re-litigating the class certification issue decided in *Duran*. Specifically, the Court of Appeal found (1) that plaintiffs did not have a due process or property right to file a class action on behalf of others; (2) that plaintiffs were not deprived of their right to pursue their individual claims; (3) that the fact the plaintiffs did not receive formal notice of the *Duran* certification proceeding did not preclude a finding that they were *collaterally estopped* by that proceeding; and (4) that all of the elements of *collateral estoppel* – identity of issues, finality, and privity – were present. As the Court of Appeal concluded,

> It is manifestly unfair to subject respondent to a revolving door of endless litigation. In cases, such as this one, where a party had a full opportunity to present his or her claim and adequately represented the interests of a second party who seeks the same

---

[2] Following the *Alvarez* trial court's decision, Petitioner's counsel filed a fourth case seeking to certify the same class of area sales managers in Orange County Superior Court. (*Alvarez* Court of Appeal Decision, Petitioner's Appendix, at 24-a1, n. 3.) In April 2007, however, after the Second Appellate District affirmed the *Alvarez* trial court ruling, the Orange County Superior Court also dismissed class allegations in that case on *collateral estoppel* grounds.

> relief, principles of equity, "[p]ublic policy, and the interests of litigants alike require that there be an end to litigation" [citation omitted].

Alvarez Court of Appeal Decision, Petitioner's Appendix, at 25-a.

On February 7, 2007, the California Supreme Court denied the *Alvarez* plaintiffs' Petition for Review. Shortly thereafter, Respondent settled all of the *Alvarez* plaintiffs' claims except for Petitioner's claim. Following the settlements, the *Alvarez* trial court, at its insistence and for docketing and budgetary reasons, dismissed the *Alvarez* plaintiffs' complaint without prejudice. In the event this Court grants Petitioner's Petition and reverses the judgment of the lower court, the *Alvarez* trial court reasoned, Petitioner could then pursue his class claims in the trial court.

REASONS FOR DENYING THE PETITION

Petitioner contends that his due process rights were violated when, without having received formal notice of the *Duran* certification proceedings, the court below held that he was *collaterally estopped* from re-litigating the certification issue decided in *Duran*. Although Petitioner cites to a number of Supreme Court, United States Court of Appeals, and California state court decisions, he fails to identify a single decision which either conflicts with or draws into question the propriety of the lower court's decision. Indeed, as the lower court noted, there is one case in the country that "deals squarely with the issue" and the lower court's decision is entirely consistent with that case. *See Alvarez* Court of Appeal Decision, Petitioner's Appendix, at 16-a.; *In re Bridgestone/ Firestone, Inc., Tires Products Litigation*, 333 F.3d 763 (7th Cir. 2003) (enjoining a state court from

certifying a nationwide class as it found that putative class members, even in the absence of notice, were *collaterally estopped* from re-litigating a previously decided nationwide class issue).

Moreover, Petitioner fails to demonstrate that the lower court's decision raises a sufficiently important issue requiring this Court's attention. Given the unique circumstances of this case, implicating multiple rulings from different courts over a ten-year period, it is unlikely that the issue will reverberate throughout the courts and reoccur with sufficient frequency to necessitate this Court's review. As a California Court of Appeal opined in a slightly different context, the re-litigation of previously decided class issues is unlikely as "'[o]nly an extraordinarily wealthy, quixotic, and masochistic plaintiff would undertake such a fruitless endeavor.'" *See, Cartt v. Superior Court*, 50 Cal. App. 3rd 960, 969, n. 15 (1975) (citation omitted).

In sum, Petitioner simply quibbles with the lower court's findings and its application of those findings to settled rules of law. For these reasons, this Court should deny Petitioner's petition for a writ of certiorari.

A. A Plaintiff Has Neither a Property Nor a Due Process Right to File a Class Action

As the lynchpin of his questions presented, Petitioner posits that he has a property or due process right to assert class allegations. According to Petitioner, the right to assert class allegations confers "some essential extra to an individual claim" that rises to the level of a constitutionally-protected right. Petition, at 18-19. Indeed, in the court below, Petitioner asserted that the mere threat of a class action enhances the value of an individual claim and that, to deprive

an individual of the right to assert such a threat, is tantamount to a "taking" and deprives that individual of his due process rights. *See* Plaintiffs' Supplemental Letter Brief to the Court of Appeal, at 1 ("the mere assertion of class allegations causes a defendant to recognize a greater potential risk (and, there from, value) in an individual litigant's claim"), at 5 ("the dismissal of class allegations is a denial of due process by virtue of the fact that the dismissal substantively affects and impairs Plaintiffs' claims"). But, as the lower court recognized, neither this Court, nor the California Supreme Court, nor any other court has held – or implied – that the ability to assert class allegations rises to the level of a constitutional right.

As both the California and federal class action rules make clear, the class action device does not in and of itself confer any substantive rights but merely creates a procedure for consolidating matters properly before a court. *See Feitelberg v. Credit Suisse First Boston, LLC*, 134 Cal. App. 4th 997, 1014 (2005) (holding that the state rule governing class actions "does not serve to enlarge substantive rights or remedies"); 28 U.S.C. §2072(b) (specifying that the federal rules, including the rule governing class actions, "shall not abridge, enlarge or modify any substantive right"). It is a "product of the court of equity" and "rests on considerations of necessity and paramount convenience." *City of San Jose v. Superior Court*, 12 Cal. 3rd 447, 458 (1974) (citations omitted); *Daar v. Yellow Cab Co.*, 67 Cal. 2nd 695, 703-704 (1967) (citations omitted). It is designed as "a means to enforce substantive law," but not to create substantive law. *City of San Jose*, 12 Cal. 3rd at 462. As such, both § 382 of the California Code of Civil Procedure and Rule 23 of the Federal Rules of Civil Procedure, which codify the doctrine, vest in the courts the power to determine if a class should

proceed and the power to regulate its course. They do not create property or due process rights.

Indeed, in similar types of representative actions, both this Court and the California Supreme Court have held that a plaintiff does not have a property or due process right to pursue claims on behalf of others. *See Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 549-550 (1948) (holding that a representative plaintiff in a shareholder derivative action is a "self-chosen representative," that the federal constitution "does not oblige the state to place its litigating and adjudicative processes at the disposal of such a representative," and that "the state has plenary power over this type of litigation"); *Californians for Disability Rights v. Mervyn's LLC*, 39 Cal. 4th 223, 233 (2006) (holding that a plaintiff's interests in suing on behalf of others under California's Unfair Competition Law "is not a property right beyond statutory control"); *Hogan v. Ingold*, 38 Cal. 2nd 802, 812 (1952) (holding that a plaintiff in a shareholder derivative action "has no vested property right" to represent others). As the court below observed, there is no reason why a plaintiff in a class action "has any greater right to serve as a representative than a shareholder in a derivative action or a representative of the public in an unfair competition suit." *Alvarez* Court of Appeal Decision, Petitioner's Appendix, at 14-a.

Petitioner relies principally on *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005) to support his argument that he has a due process or property right to assert class allegations. Petition, at 18-19. However, *Discover Bank* is readily distinguishable and does not conflict with the lower court's decision. In *Discover Bank*, the California Supreme Court simply weighed the competing policies behind arbitrations and class actions and found, in the context of a consumer claim

where a consumer's only viable remedy is by means of a class action, that the policy behind class actions trumped the policy behind arbitrations. Not surprisingly, *Discover Bank* never addressed the issue of whether the mere threat of a class action would somehow enhance the value of an individual's claim and rise to the level of a property right. Moreover, the *Alvarez* plaintiffs, including current employees, clearly recognized that they had an individual remedy outside of the class action context as they initially filed their claims in their individual capacities and only sought to add class allegations *after* the *Duran* court issued a series of rulings which they believed were adverse to their interests.

B. A Plaintiff May Be Collaterally Estopped From Re-Litigating a Previously Decided Class Certification Decision, Even in the Absence of Notice of That Decision

In his questions presented, Petitioner contends that due process concerns arise where, as here, a defendant seeks to preclude re-litigation of a certification decision that was issued without formal notice to putative class members. Petition, at 6-8. In fashioning his argument, Petitioner ignores the fact – emphasized in the court below – that such preclusion does not affect putative class members' substantive right to pursue their individual remedies as they would still "remain free to litigate the merits of their personal claims." *Alvarez* Court of Appeal Decision, Petitioner's Appendix, at 13-a, 21-a. As Petitioner's substantive right to pursue his individual remedy remains unaffected, he can be precluded from re-litigating an earlier certification decision, even in the absence of formal notice, without running afoul of the due process clause.

In marshalling his argument, Petitioner once again fails to point out to the Court the only authority directly on point. The Seventh Circuit, in *In re Bridgestone / Firestone, Inc. Tires Product Liability Litigation*, 333 F.3rd 763 (2003), directly addressed and rejected Petitioner's contention. In *Bridgestone / Firestone*, the Seventh Circuit enjoined a state court from certifying a nationwide class as it found that putative class members, even in the absence of notice, were *collaterally estopped* from re-litigating an earlier certification ruling:

> [N]o statute or rule requires notice, and an opportunity to opt out, before the certification decision is made; it is a post-certification step. [Citations omitted.] No one is entitled to opt out of the certification [process], a decision necessarily made on a class-wide, all-or-none basis; one opts out of a certified class. And a person who opts out receives the right to go it alone, not to launch a competing class action. Preserving the right to litigate individually, as one's own champion, is the point of opting out. The opt-out avoids any risk of the class's loss on the merits and also forswears any opportunity to take advantage of the class's victory. [Citations omitted.] *Every person included in the district court's class definition still has the right to proceed on his own. What such a person now lacks is the right to represent a national class of others similarly situated; that's the upshot of a fully contested litigation in which every class member was adequately represented on this issue.*

Bridgestone / Firestone, 333 F. 3rd at 769 (emphasis added). So long as the interests of a putative class member were adequately represented in an earlier, fully contested

certification proceeding, no rule, statute or principle of due process requires that he receive notice of that proceeding as a precondition to precluding him from re-litigating the certification decision.[3]

C. A Plaintiff May Be Collaterally Estopped From Re-Litigating A Class Certification Decision if the Plaintiff Is in Privity With the Plaintiff Who Litigated that Decision and if His Interests Were Adequately Protected

In his questions presented, Petitioner further contends that the lower court, in derogation of his due process rights, misstated the reach of the *collateral estoppel* doctrine in holding that he was in "privity" with the *Duran* plaintiffs. Petition, at 9-14. In the process, Petitioner contends, the lower court created an "absolute rule of law" forever holding

---

[3] Petitioner cites to a series of California lower appellate court rulings and suggests that those rulings conflict with the ruling in the court below. Petition, at 7-8. If they existed, such conflicts would be of dubious relevance to the Petition. However, Petitioner's case law yields no such conflict. In *Home Savings & Loan Assn. v. Superior Court*, 42 Cal. App. 3rd 1006 (1974), the Court of Appeal did not address the issue of whether notice is required, but, assuming it was required, it addressed the issue of when it must be given. In *Johnson v. American Airlines, Inc.*, 157 Cal. App. 3rd 427 (1984), contrary to Petitioner's representation, the Court of Appeal held that a plaintiff was *collaterally estopped* from attacking a settlement in an earlier class action even though she did not receive formal notice of that action. *See Johnson*, 157 Cal. App. 3rd at 433 (for purposes of *collateral estoppel*, "[t]he courts have held that due process does not require [] notice" in certain types of class actions and "requires only that class members be adequately represented").

that a putative class member is in "privity" with any plaintiff who brings a class action. Petition, at 11. According to Petitioner, the lower court's misstatement of the *collateral estoppel* doctrine is in direct conflict with this Court's, the United States Courts of Appeals', and the California courts' precedent. In reality, however, the lower court simply followed settled *collateral estoppel* principles and applied those principles, following a "close examination," to the particular facts of his case. *Alvarez* Court of Appeal Decision, Petitioner's Appendix, at 18-a – 20-a. Therefore, Petitioner's contention fails to set forth a sufficiently compelling reason for this Court's review.

Despite Petitioner's protestations, the articulation of the *collateral estoppel* doctrine by the lower court is entirely consistent with the cases upon which Petitioner relies. As a threshold matter, the lower court, consistent with the cases Petitioner relies on, recognized that the purpose of the "privity" requirement – whereby a non-party to an earlier case can be bound by a decision in that earlier case – is to ensure that the non-party's interest "was adequately represented in the prior proceeding." (*Alvarez* Court of Appeal Decision, Petitioner's Appendix, at 18-a.)[4] The lower court, consistent with the cases Petitioner relies on, then recognized that for "privity" to exist Petitioner's interests had to be "sufficiently close" to those of the *Duran* plaintiffs so as to render the *Duran* plaintiffs the "virtual representative" of

---

[4] *See, e.g., Richards v. Jefferson County*, 517 U.S. 793 (1996) (holding that adequate representation is a due process prerequisite to precluding a litigant from his day in court if he was not a party to the earlier litigation).

Petitioner in the *Duran* case. (*Alvarez* Court of Appeal Decision, Petitioner's Appendix, at 18-a.)[5]

Of course, the crux of Petitioner's argument really lies in the lower court's application of the law to the facts of his case. In this respect, Petitioner contends that his interests could not possibly have been adequately represented by the *Duran* plaintiffs as these plaintiffs were found by the *Duran* courts to be "atypical" and "inadequate." Petition, at 14-17. Petitioner is simply wrong. Lest there by any doubt, the *Duran* Court of Appeal held that the *Duran* plaintiffs could never certify their proposed class because of the absence of commonality:

> . . . And, if a similar split in opinion exists company-wide among [area sales managers], it would not be proper to certify plaintiffs as class representatives for a class whose members are so dissimilar in interests. *Common questions of fact could not predominate among the 1600 [area sales managers]* . . . .

---

[5] *See, e.g., Takeda v. Northwestern Nat. Life Ins. Co.*, 765 F.2d 815, 821 (9th Cir. 1985) (the "inquiry is whether the relationship between the party to be estopped and the party in a prior litigation is 'sufficiently close' so as to justify the application of *collateral estoppel*"; citation omitted); *Headwaters, Inc. v. U. S. Forest Service*, 399 F.3rd 1047, 1053-1054 (9th Cir. 2005) (to support a finding of "privity" there must be an "identity of interests" and "adequate representation"); *Victa v. Merle Norman Cosmetics, Inc.*, 19 Cal. App. 4th 454, 464 (1993) (privity "requires that the nonparty have had an identity or community of interest with, and adequate representation by, the losing party in the first action"; citation omitted).

> We recognize that numerous collateral issues are raised by the parties. But in light of our disposition, the other matters are not significant and we do not address them.

(*Duran* Court of Appeal Decision, Pltffs. App., at 164-165.)

"When a trial court judgment decides a case on two alternate grounds, and the appellate court affirms based on one ground, the judgment is binding under principles of . . . *collateral estoppel* only on the ground addressed by the appellate court." *Newport Beach Country Club v. Founding Members of Newport Beach Country Club*, 140 Cal. App. 4th 1120, 1123 (2006). As the *Duran* Court of Appeal affirmed the trial court solely on the ground that the requisite commonality was absent, Petitioner's contention that he cannot be in "privity" with the *Duran* plaintiffs because the *Duran* trial court also found them to be "atypical" and "inadequate" is contrary to the law.

Petitioner then contends that the lower court improperly relied on the fact that his counsel was also counsel of record in the *Duran* case. Petition, at 12-14. First, the lower court relied on this fact only as "one" factor in its analysis and Petitioner has altogether failed to demonstrate that this factor was the decisive factor in the outcome of the case. *Alvarez* Court of Appeal Decision, Petitioner's Appendix, at 19-a ("similarity of counsel is *one* factor that may be considered on the issue of whether a non-party's interest was truly represented in the first lawsuit"; emphasis added). Second, Petitioner ignores that the lower court relied on this factor solely to illustrate that Petitioner had made "no allegation that the representation provided to the plaintiffs in *Duran* was inadequate." *Alvarez* Court of Appeal Decision, Petitioner's Appendix, at 19-a. It did not rely on this factor to determine

whether there was a "sufficiently close" relationship between Petitioner and the *Duran* plaintiffs to justify a finding of "privity." As such, its consideration of this factor cannot be said, as Petitioner contends, to chill a plaintiff from otherwise choosing an attorney of choice to protect his or her interests.

D. Petitioner Fails to Set Forth a Compelling Reason for This Court to Grant His Petition

Petitioner has failed to present a compelling reason that would merit this Court's review. Petitioner has failed to demonstrate either that the lower court's decision conflicts with a decision from this Court or a United States Court of Appeal or that the lower court's decision raises overriding constitutional issues requiring this Court's immediate attention. In essence, Petitioner simply advocates for his counsel's right to file the same claim "in as many courts as necessary" until he can secure a favorable result and thus, through re-litigation, "*turn even an unlikely outcome into reality.*" *Bridgestone / Firestone*, 333 F.3rd at 766-767 (emphasis added). He seeks, in other words, to "perpetuate an asymmetric system in which class counsel can win but never lose." *Id.* Obviously, this kind of "asymmetric" enhancement of a class counsel's likelihood of success is not the kind of result suggested by logic or due process.

CONCLUSION

Respondent respectfully requests that this Court deny the petition for writ of certiorari.

Respectfully submitted,

LAW OFFICES OF JULIA AZRAEL
John S. Curtis
Counsel of Record
5200 Lankershim Blvd., Suite 850
North Hollywood, California 91601
Telephone: (818) 766-5177
Fax: (818) 766-5047

MACY'S, INC. (f/k/a Federated Department Stores, Inc.)
David E. Martin
Catherine E. Sison
Law Department
611 Olive Street, Suite 1750
St. Louis, Missouri 63101
Telephone: (314) 342-6719
Fax: (314) 342-3066